

**SMITH & LOWNEY, P.L.L.C.**

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July 18, 2011

**Via Certified Mail - Return Receipt Requested**

Dennis McLerran, Administrator  
Environmental Protection Agency Region 10  
1200 Sixth Ave., Suite 900  
Seattle, WA 98101

**Via Certified Mail - Return Receipt Requested**

Lisa Jackson, Administrator  
Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460

**Re: NOTICE OF INTENT TO SUE UNDER THE CLEAN WATER ACT  
CONCERNING SPOKANE RIVER PCB TMDL**

Dear Administrators McLerran and Jackson:

We represent Sierra Club, 85 Second Street, 2<sup>nd</sup> Floor, San Francisco, CA 94105, (415) 977-5500, and Center for Environmental Law and Policy, 25 West Main, Spokane, WA 99201, (509) 209-2899. Any response or correspondence related to this matter should be directed to us at the letterhead address. This letter is to provide you with sixty days notice of Sierra Club and Center for Environmental Law and Policy's intent to file a citizen suit against you and EPA (hereinafter, collectively "EPA") under Section 505(a)(2) of the Clean Water Act ("CWA"), 33 USC § 1365(a)(2), for the violations described herein concerning EPA's failure to perform its nondiscretionary duty under CWA Sec. 303(d)(2) with regard to the total maximum daily load ("TMDL") for PCBs in the Spokane River.

Clean Water Act and TMDLs

Congress passed the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that objective, Congress declared as a "national goal" that "the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.*

EPA's regulatory program for water protection focuses on two potential sources of pollution: point sources and nonpoint sources. Point source pollution was addressed in the 1972 amendments to the CWA, where Congress prohibited the discharge of any pollutant from any point source into certain waters unless that discharge complies with the CWA's

specific requirements. 33 U.S.C. §§ 1311(a) and 1362(12). Under this approach, compliance focuses on technology-based controls to limit the discharge of pollutants through the National Pollutant Discharge Elimination System (“NPDES”) permit process.

When these requirements are found insufficient to clean up certain waterbodies, the CWA requires use of a water quality-based approach. States are required to identify such waters and designate them as “water quality limited.” The states are then to establish a priority ranking for these waters, and in accordance with that ranking, to establish more stringent pollution limited called “total maximum daily loads,” or “TMDLs.” 33 U.S.C. §§ 1313(d)(1)(A) and (C). TMDLs are the greatest amount of a pollutant the water body can receive daily without violating a state’s water quality standard.

The TMDL calculations help ensure that the cumulative impacts of multiple point source discharges are accounted for, and evaluated in conjunction with pollution from nonpoint sources. States are then required to take whatever additional cleanup actions are necessary, which can include further controls on both point and nonpoint pollution sources. As a GAO report concluded, the TMDL process:

Provides a comprehensive approach to identifying and resolving water pollution problems regardless of the sources of pollution. If implemented, the TMDL process can provide EPA and the states with a complete listing of key water pollutants, the source of the pollutants, information on the amount of pollutants that need to be reduced, options between point and/or nonpoint approaches, costs to clean up, and situations where it may not be feasible to meet water quality standards.<sup>1</sup>

Under Sec. 303(d), states and EPA are required meet a schedule regarding TMDL lists: TMDL lists were to be submitted to EPA by states no later than 180 days after EPA’s publication of first water pollutants list (June 26, 1979); EPA was to approve or disapprove the submissions within 30 days after that (July 26, 1979); and, upon disapproval, EPA was to promulgate its own TMDLs within 30 days (August 25, 1979). 33 U.S.C. § 1313(d)(2); *see, American Canoe Ass’n v. EPA*, 30 F.Supp.2d 908, 921 (E.D. Va. 1998).

#### CWA citizen suit provision

CWA Sec. 505(a)(2), 33 U.S.C. § 1365(a)(2), authorizes citizens to bring suit in federal court against EPA for failing to perform an “act or duty” under the CWA that is not discretionary. The courts have jurisdiction to order EPA to perform such act or duty, and to award costs of litigation, including reasonable attorney and expert witness fees. 33 U.S.C. §§ 1365(a) and (d).

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<sup>1</sup> US Government Accounting Office, “Water Pollution – More EPA Action Needed to Improve the Quality of Heavily Polluted Waters,” January 1989 (GAO/RCED-89-38) at 34 – 35; cited by *Alaska Center for the Environment v. Reilly*, 762 F.Supp. 1422, 1424 (W.D. Wash. 1991).

EPA's duties to approve or disapprove TMDL submissions, and to promulgate its own TMDLs upon disapproval, are non-discretionary, and these duties extend to a state's constructive submission of TMDLs. *See, Scott v. City of Hammond*, 741 F.2d 992, 996-997 (7<sup>th</sup> Cir. 1984); *American Canoe Ass'n*, 30 F.Supp.2d at 919 – 921; *Alaska Center for the Environment v. Reilly*, 762 F.Supp. 1422, 1426 - 1429 (W.D. Wash. 1991).

Spokane River PCB TMDL

Fifteen waterbody segments of the Spokane River and Lake Spokane (also known as Long Lake), and one segment of the Little Spokane River are on Washington's final and approved 303(d) list for not meeting Washington State's human health water quality criterion for polychlorinated biphenyls (PCBs) in edible fish tissue:

<u>Waterbody</u>	<u>Reach</u>	<u>Waterbody Number</u>	<u>Watercourse Number</u>	<u>Listing ID</u>
Spokane River	Idaho Border to Latah Creek	WA-57-1010	QZ45UE	14397 14398 8201 8207 8202 14402
Spokane River	Latah Creek to Ninemile Dam	QA-54-1010	QZ45UE	14400 14385 9033
Little Spokane River	Near mouth	QA-55-1010	JZ70CP	9051
Lake Spokane (Long Lake)	Ninemile Dam to Lake Spokane Dam	WA-54-9040	QZ45UE	9021 36441 9015 36440
Spokane River	Lake Spokane Dam to Mouth	WA-54-1020	QZ45UE	9027

The Spokane Tribe human health PCB water quality criterion of 3.37 pg/l (parts per quadrillion) applies to portions of the Lake Spokane (Long Lake) sections and are also not met. Washington State's human health criteria for PCBs is 170 pg/l (5.3 ng/g in fish tissue), the difference between the two standards being primarily due to assumptions about human consumption rates of fish.

Listing IDs 8201, 8202, 8207, 9015, 9021, 9027, 9033 and 9051 have been included on the Washington State 303(d) lists since 1996. Listing IDs 14385, 14397, 14398, 14400, 14402, 36440, and 36441 have been included since 2004.

The Washington Department of Ecology conducted water quality studies from 2003 to 2007 to assess PCB sources to the Spokane River. The goal of these efforts was to quantify

PCB contamination and identify necessary reductions in sources and the receiving waters to meet applicable PCB water quality criteria in the Spokane River. The studies, which analyzed PCBs in river water, industrial and municipal effluents, stormwater, suspended particulate matter bottom sediments, sediment cores, and fish tissue, are described in “Spokane River PCB Source Assessment 2003 – 2007,” Department of Ecology Publication No. 11-03-013 (April 2011).<sup>2</sup>

In May 2011, Ecology published “Spokane River Toxics Reduction Strategy,” Department of Ecology Publication No. 11-10-038.<sup>3</sup> At page 19 of this document, Ecology explains that “[a] draft Spokane River PCB TMDL was issued for public comment in June 2006 but was not completed because of the need for more data, including more accurate stormwater data, updated fish tissue sampling results, and the addition of new Spokane Tribe water quality standards for PCBs based on updated fish consumption rates. The draft TMDL was revised with this updated information in 2009 and issued as the Spokane River Source Assessment Report in 2011.”

Also on that page, Ecology declares the following:

Ecology is not currently planning to develop a PCB TMDL with wasteload allocations, but this is still a potential tool for the future. Setting wasteload allocations through a TMDL to accomplish that would set a target well below the ‘background’ PCB concentrations observed in remote bodies of water with no obvious source of contamination other than aerial deposition.

In part because it would establish an impossible near-term target, and based on its experience with the Spokane River Dissolved Oxygen TMDL, which took 12 years to complete, Ecology is opting to proceed directly to implementing measures to reduce all toxics to the Spokane River. Those measures are described in this strategy. Such a *straight-to-implementation* plan is a recent strategy being adopted by EPA and Ecology to address the many bodies of water that are on the list of polluted waters [called the 303(d) list] through tools other than TMDLs. Ecology plans to develop a straight-to-implementation plan for Spokane River toxics in 2012.

#### Intent to sue

With its actions, delay, and this declaration, Ecology has constructively submitted a TMDL for PCBs in the 303(d)-listed segments of the Spokane River identified above. EPA has failed to perform its non-discretionary duty to review and approve or disapprove this constructively submitted TMDL, and, in the event of disapproval, to promulgate its own TMDL. Sierra Club and Center for Environmental Law and Policy will file a lawsuit under 33 U.S.C. § 1365(a)(2) against EPA no less than sixty days from the date of this notice of intent

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<sup>2</sup> Available at <http://www.ecy.wa.gov/biblio/1103013.html>.

<sup>3</sup> Available at <http://www.ecy.wa.gov/biblio/1110038.html>.

to sue. Relief sought will include declaratory and injunctive relief, as well as the award of litigation expenses.

If you wish to discuss the allegations in this notice of intent to sue or the potential for settlement of this matter, please contact the undersigned at your earliest convenience. We do not intend to postpone the filing of a complaint if discussions have not been concluded at the expiration of the sixty-day notice period.

Very truly yours,

**SMITH & LOWNEY, PLLC**

By: *s/Richard A. Smith*  
Richard A. Smith

c: Eric H. Holder, Jr., U.S. Attorney General